IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE
WILLIAM LEROY McDONALD AND
BONNIE KAYE McDONALD
Debtors

Case No. 14-40529

DEBTORS' BRIEF IN RESPONSE TO TRUSTEE'S BRIEF ON HIS MOTION TO DISMISS AND OBJECTION TO CONFIRMATION

COME NOW debtors and respond to the Trustee with the following argument and authorities. Trustee's statement of the essential facts is acceded; however, debtors add that the second issue posited must also include whether the per capita payments received by debtor Bonnie McDonald are exempt under the Potawatomi Tribal Code. Trustee also forces this Court to once again confront the issues of "best efforts" and "best interests" and "good faith" (although he avoids use of the later phrase).

1. Trustee states at page 3 of his brief that: "This case involves the interpretation of the PBPN Tribal Code and recent changes to it, . . ." He then argues at page 24 of his brief that Tribal Code provisions are internally inconsistent. Given that the Tribe is a federally recognized sovereign, it behooves this Court as a matter of comity to ask the Tribal Council for clarification before proceeding to decide these issues. 25 C.F.R. 290.12(5) requires the Tribe to, "utilize or establish a tribal court system, forum or administrative process for resolution of disputes concerning the allocation of net gaming revenues and the distribution of per capita payments," which it has done. See Exhibit A, Article V Calculation and Disbursement of Per Capita Payments, section 6, which states: "Any dispute regarding this ordinance, implementation

thereof, or action taken thereunder shall be first presented to the Tribal Council whose decision may then be appealed to the Potawatomi Tribal Court, whose decision shall be final." See also Exhibit A, Chapter 4-14, Claims Against Per Capita, Section 4-14-1(D)(2) Definitions. This would include the current dispute over the meaning of "personal benefit," a phrase not found in the Bankruptcy Code but in Section 4-14-1 (E)(1), and the intent behind Section 4-14-1(H) Prohibited Claims, as well as the meaning of "other benefit" exempt from process by Section 4-10-16(H). The latter phrase is certainly sufficient to encompass the per capita payments. Please note Debtors' Amended Schedule C. These three issues clearly involve "tribal ordinance or custom" and 25 U.S.C. 1322(c) affirms the policy of Congress to recognize tribal ordinances and customs as local law, when applicable:

> Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

The Uniform Certification of Questions of Law drafted by the National Conference of Commissioners on Uniform State Laws, though not yet enacted in Kansas, states: "The section affords States the option of authorizing a state court to certify questions to a tribal court or answer questions from a tribal court." http://www.uniformlaws.org/shared/docs/certification_of_questions_of_law/ucqla_final_95.pdf. See, for example, *Kester v. Kester (In re Kester)*, 493 F.3d 1208, 1209 (10th Cir. 2007): "This case is before us following our certification of a novel and dispositive issue of state law to the Kansas Supreme Court."

The Potawatomi Tribal Council and Court are the arbiters of tribal law and should be consulted on these novel and important issues. As pronounced in *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (U.S. 1985): "Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination." Certifying these questions to the Potawatomi Tribal Council and Council is consistent with that policy. Such has been done before in this state. See *Whitebird v. Kickapoo Housing Authority*, 751 F. Supp. 928, 930 (D. Kan. 1990):

> Thus, although the court finds both that plaintiff has adequately alleged the court's subject matter jurisdiction to withstand defendants' motion to dismiss on that ground, and that the court possesses jurisdiction over the subject matter of this case, the court finds that the principles of comity underlying the exhaustion requirement dictate that this court defer to tribal court remedies. *Iowa Mutual Ins. Co.*, 480 U.S. at 16; *National Farmers Union Ins. Cos.*, 471 U.S. at 857; *Brown*, 835 F.2d at 1328. Thus, given the above-outlined facts of this case and the applicable case law, the court finds that this action should be dismissed so that the tribal court may have an opportunity to consider this matter. *Brown*, 835 F.2d at 1328.

2. As is well-known, the Tribe operates a "tribal gaming facility" called the Prairie Band Casino & Resort under the auspices of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. 2701(4), which provides, *inter alia*: ". . . a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government." 25 U.S.C. 2701-2721, and accompanying federal regulations, 25 C.F.R. 290, *et seq*., govern Tribal Revenue Allocation Plans. Casino gaming is Class III gaming under the IGRA. 25 U.S.C. 2703(8) and each tribe that engages in casino gaming must negotiate a "compact" (actually a treaty) with its

State, which must be approved by the United States Secretary of the Interior, pursuant to 25 U.S.C. 2703(7)(E) and (10). Kansas enacted K.S.A. 46-2302(b), which provides, *inter alia*:

> The governor or the governor's designated representatives are authorized to negotiate gaming compacts on behalf of the state of Kansas. At the conclusion of negotiations, the governor shall submit the proposed compact to the joint committee on state-tribal relations for the committee's recommendations as to approval or modification of the proposed compact.

25 U.S.C. 2710 provides, *inter alia*, that:

> (B) net revenues from any tribal gaming are not to be used for purposes other than--
> (I) to fund tribal government operations or programs;
> (ii) to provide for the general welfare of the Indian tribe and its members;
> (iii) to promote tribal economic development;
> (iv) to donate to charitable organizations; or
> (v) to help fund operations of local government agencies;

To allow Trustee to take the per capita from Mrs. McDonald would be to continence a violation of the foregoing carefully considered and crafted laws--to break the treaty, in other words--particularly so given the long and broad sweep of Tribal exemption provisions found at Section 4-14-1(B) noted by this counsel in his earlier brief. The law code of the Tribe, it being a sovereign, is entitled to the same respect as if it were one of the 50 states; and where, "statutes and case law are silent in regards to the extraterritorial effect of . . . ," a state's exemption, extra-territoriality may be presumed. See *In re Woodruff*, 2005 Bankr. LEXIS 832 (Bankr. W.D. Mo. Apr. 28, 2005); *Fernandez v. Miller (In re Fernandez)*, 2011 U.S. Dist. LEXIS 86528 (W.D. Tex. Aug. 5, 2011) ("There is nothing in this provision limiting the reach of the homestead exemption to property located in state, or making it available only to debtors or domiciliaries of Nevada.")

3. Trustee argues that 11 U.S.C. 1306, "expands the definition of 541 property of the estate in a Chapter 13." But, does it in this instance? 11 U.S.C. 541(a) speaks of, ". . . all legal or equitable interests of the debtor in property as of the commencement of the case." Neither McDonald had an interest in any per capita distribution at the commencement of this case: neither a future, possessive, speculative nor derivative interest. 11 U.S.C. 541(a)(5)(A), (B) and (C) bring into the estate property inherited or obtained in a divorce, as well as life insurance proceeds received within 180 days of the filing of the petition, but do not mention tribal per capita payments. See *In re Fess*, 408 B.R. 793, 799 (Bankr. W.D. Wis. 2009), following *In re Hall*, 394 B.R. 582, 596 (Bankr. D. Kan. 2008):

> . . . , "[w]hen the drafters of the Bankruptcy Code intended to include expectancies to which no legal rights attach (such as those of a person named in a will), they recognized the need to be specific and not rely on the general language of § 541(a)(1)." Id. Similarly here, Fess simply has an expectancy to which no legal rights attach. Section 541(a)(1) is simply not broad enough to encompass her interest.

July 15, 2013, amendments to Section 4-14-1 (G), (H) of the Tribal Code answer the objection of Judge Somers that, ". . . the Potawatomi Tribal Ordinance does not have provisions similar to those of the Ho-Chunk Nation Code which controlled the outcome in *Fess* . . . ." *In re Howley*, 446 B.R. 506, 513 (Bankr. D. Kan. 2011).

Briefly to be noted at page 21 of his brief, Trustee complains of nothing in the record showing approval of amendments to the Tribal Code by the Bureau of Indian Affairs (BIA). However, there is nothing in the record showing the contrary and Trustee stipulated to its

admission for all purposes and without reservation. See paragraph 8 of the Stipulations of Fact filed herein. It is too late for Trustee to raise the red herring of BIA approval.

4. 11 U.S.C. 1306(b) states: "Except as provided in a confirmed plan or order confirming a plan the debtor shall remain in possession of the estate." Although this plan has not been confirmed, the standard form plan used in this district does not provide otherwise. There is no reason debtor should not remain in possession of the per capita payments, even if they be included within the definition of 11 U.S.C. 541. In any event, 1306(b) does not reach them, as it refers to, "all property of the kind specified in [section 541] that the debtor acquires after the commencement of the case . . . ." What is specified in 541 is found within sections (a) (2), 3, 4, 5, 6 and 7 thereof. "Specify" has a generally accepted meaning: free from ambiguity--and here it is so and does not include per capita payments debtor Bonnie McDonald may receive *in futuro*.

5. All agree that capita payments are not, "earnings from services performed by the debtor," mentioned in 1306(a)(2) and do not fall into Trustee's hands by that provision. In fact they do not come within 11 U.S.C. 1325(b)(1)(2), which defines "disposable income" to mean "current monthly income received by the debtor." If this counsel has counted correctly, the phrase "monthly income" was used by Congress three times in that statute erasing any doubt it was unintended or casual. See *Hamilton v. Lanning*, 560 U.S. 505, 510 (U.S. 2010). Per capita payments do not fit that definition as they are distributed periodically, not monthly. They are *sui generis*, reparations really, "to assuage and address the multiple wrongs," committed by the

United States government against Indian tribes. See Exhibit A, Chapter 4-14, Claims Against Per Capita, Section 4-14-1(C) Purpose. A fair reading of Section 4-14-1 Claims Against Per Capita in its entirety reveals the intent of the Tribe to retain jurisdiction over per capita payments and protect them from seizure even after distribution to Tribal members, just as Social Security payments are protected by the federal government even in the hands of recipients. In fact, it closely follows the Social Security model for protecting benefits in the hand of beneficiaries. See http://www.socialsecurity.gov/OP_Home/handbook/handbook.01/handbook-0129.html. This is a matter upon which this Court needs Tribal input and sound reason to propound a certified question to the Tribal Council and Tribal Court as to the meaning of "personal benefit."

6. Now to the "best interests of creditors" issue: 11 U.S.C. 1325(2) does not encompass the per capita payments, as it clearly defines and limits what debtors must pay through the plan:

> For purposes of this subsection, the term "disposable income" means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended– (Emphasis supplied.)

The Trustee avoids calling them "current monthly income" and notes that the Tribal Code refers to them as, "periodic payment not a property right." Thus, they come within neither 1325(2) nor the definition of 541(a). See *Hamilton*, supra. However, debtor Bonnie McDonald has guessed at, estimated, extrapolated and accounted for them at $361per month to show good faith and to forestall any claims of deception, dissembling, fraud or coverup. (They are also

shown at Schedule B 35 as property having a present value of $1,200, probably an error on the part of this counsel.) *In re Hutchinson*, 354 B.R. 523, 533 (Bankr. D. Kan. 2006), held:

> . . . if Debtors propose to retain their right to spend the per capita distributions to pay their ongoing living expenses and to help fund their Chapter 13 plan, they have the right to do so. However, they too have to provide payments to the unsecured creditors in an amount equal to what those creditors would have received if the right to receive those payments were liquidated.

That case raises the thorny issue of how one would liquidate such potential distributions. Who would buy them, if they could not execute against the Tribe and collect the future flow? Debtors suggest it is the burden of Trustee to establish that a market for liquidated per capita exists, as well as the fair market value of liquidated per capita before making such a demand.

7. On the subject of "best efforts," after consideration of the proposed plan payment of $130, McDonalds are left with $224.84 per month, counting both their Social Security payments and her extrapolated per capita, the amount of which she can never predict. In fact, McDonalds have gone beyond that required of them for "best efforts"and included their Social Security disability income in Schedule I. See *In re Scott*, 488 B.R. 246, 253 (Bankr. M.D. Ga. 2013): ". . . social security benefits are simply not disposable income for purposes of section 1325(b)(2)."

> The three circuit courts of appeal to consider the issue have all concluded that social security benefits are not to be included in the calculation of "projected disposable income". See *Baud v. Carroll*, 634 F.3d. 327 (6th Cir. 2011), cert. denied, 132 S. Ct. 997, 181 L. Ed. 2d 732 (2012); *Cranmer*, 697 F.3d at 1318; *Beaulieu v. Ragos (In re Ragos)*, 700 F.3d 220 (5th Cir. 2012). All three of these courts of appeal looked at the language of 11 U.S.C. § 101(10A) and found that the definition specifically excluded social security benefits from the calculation of projected disposable income. *Baud*, 634 F.3d. at 345-47; *Cranmer*, 697 F.3d. at 1317-18; *Ragos*, 700 F.3d at 223. (Ibid.)

CONCLUSION. As a matter of comity, this Court should refer these novel questions to the Potawatomi Tribal Council by way of certified question for ruling and for clarification of the "internal inconsistency" seen by Trustee before proceeding further. A determination should be sought from the Tribal Council and Tribal Court whether its jurisdiction extends to enrolled tribal members residing off the reservation and whether the Code protects per capita payments after receipt by them.

That being said, per capita payments are not property of the estate, nor subject to seizure by Trustee and are properly claimed exempt under the expansive Tribal Code, enacted pursuant to the treaty between the Tribe and the State of Kansas authorized by the federal government. In a show of "good faith," debtors have gone beyond the necessary and listed their Social Security income. Truth be told, the McDonalds would probably be unable to meet their modest monthly expenses, if the Trustee takes the extrapolated $361 and pays it to their unsecured creditors. The projected per capita payments are necessary for them to maintain a minimal standard of living over the coming 36 months--this with debtors having neither monthly mortgage nor rental payment! Trustee has not questioned their living expenses. As noted by *In re Hutchinson*, supra at 529: "Merriam Webster's Collegiate Dictionary (10th ed. 1994) defines 'public assistance' as 'government aid to the needy, blind, aged, or disabled persons and to dependent children.'" Here, the projected, estimated and extrapolated per capita from the Potawatomi Tribal government keeps the McDonalds from the church soup kitchens, Let's Help and the annual

Community Thanksgiving Table at the Kansas Expo Center. If this is not one purpose of our treaty with the Prairie Band Potawatomi Nation, what is?

WHEREFORE debtors pray that Trustee's objection to their plan, as well as his motion to dismiss be overruled and they have their costs, including attorney's fees for opposing same.

s/FRANK D. TAFF
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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of October, 2014, I electronically filed the foregoing Debtors' Brief in Response to Trustee's Brief on His Motion to Dismiss and Objection to Confirmation with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to all parties of interest participating in the CM/ECF system.

s/FRANK D. TAFF
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